S.B. CIVIL WRIT PETITION NO.3154/2005

Aaskaran Vs. Ratan Lal and others.

Date : 5.7.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. KC Samdaria, for the petitioner.
Mr. Manish Shishodia, for the respondent no.1/caveator.

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Heard learned counsel for the parties.

Brief facts of the case are that a suit for eviction was filed by Ratan Lal (now deceased) against the petitioner tenant on the ground that the petitioner committed default in payment of rent and suit shop is required for need of the plaintiff's son Vijay Raj. Initially the suit was decreed ex-parte but on application of the petitioner, the ex-parte decree was set aside by the trial court on 17.7.1995. Again on 19.2.1997, ex-parte decree was passed against the petitioner. The petitioner submitted an application for setting aside the ex-parte decree on 6.11.1997 and he submitted that he had no knowledge of passing of the decree by the trial court till he was informed by his neighbour Ashok Kumar on 8.10.1994 (it appears that the year 1994 has been given wrongly as the decree was passed in the year 1997). He obtained copies of relevant judgment and decree and thereafter, submitted the application for setting aside the ex-parte decree on

6.11.1997.

The trial court permitted the parties to produce evidence upon which the petitioner gave his own statement and thereafter, summoned the advocate who was conducting the case of the petitioner before the trial court (hereinafter to be referred as “local counsel”) to give statement on oath upon which the local counsel was examined. Copy of statement of petitioner's advocate is placed on record as Annex.6. The respondent no.1/1 gave his statement to rebut the evidence of the petitioner which is placed on record as Annex.7. The petitioner also placed on record certified copies of the order-sheets of the trial court to show that local counsel did not appear in court any time after setting aside of ex-parte decree.

According to learned counsel for the petitioner, though the petitioner specifically pleaded in his application that the local counsel told the petitioner that whenever there will be his need, he will be called but he did not call the petitioner. He also stated that even before not appearing before the court, the local counsel did not gave any notice to him. It is also submitted that the local counsel did not inform about passing of the decree against him. It is also submitted that in fact, the petitioner was in contact with his local counsel and that fact has been admitted by the local counsel. The petitioner also placed on record copies of challans as Annex.9 to Annex.17 to show that the rent was deposited by the petitioner through his counsel upto

the period of January, 1997. Therefore, the petitioner was in direct contact with his local counsel in January, 1997 is clearly proved whereas the trial court passed the decree on 19.2.1997.

According to learned counsel for the petitioner, in fact, there was no fault of the petitioner as he was not asked to sign any written statement for filing in the court despite the fact that the petitioner was directly meeting his local counsel for few years.

It is also submitted by learned counsel for the petitioner that his local counsel admitted that he used to deposit the rent for the shop in question for and on behalf of the petitioner and at the same time, he stated that the petitioner took away the file after a quarrel for paying the costs of setting aside of ex-parte decree dated 17.7.1995. In view of the documentary evidence proved by the petitioner, the plea of the local counsel cannot be believed that there was any quarrel between the petitioner and local counsel. It also cannot be believed that the petitioner was not in continuous touch with his advocate.

According to learned counsel for the petitioner, two courts went absolutely astray in appreciating the facts and unnecessary influenced by the appearance of defendant's different advocate at different times which were before the ex-parte decree dated 19.2.1997. It is also submitted that the facts mentioned in the application itself sufficiently

constitute sufficient cause for not filing the application for condonation of delay in the court and the courts should have condoned the delay in filing the application looking to the fact that the petitioner is a poor person and petty shopkeeper and was not well acquaint with the legal proceedings.

It is also submitted that when the petitioner signed the application under Order 9 Rule 13 CPC, it cannot be said that he would not have signed the application for condonation of delay after if it was prepared by the counsel. Therefore, even if the application under Section 5 was not filed, it was due to the fault of the local counsel while filing the application under Order 9 Rule 13 CPC.

Learned counsel for the respondent no.1 vehemently submitted that the petitioner was served with summons and thereafter he did not appear and, therefore, on earlier occasion also, ex-parte decree was passed against him. The petitioner could not took advantage of setting aside of the ex-parte decree by the trial court and he did not even submit the written statement. It is also submitted that the stand of the petitioner is that he did not contacted his local counsel because local counsel told him that whenever there will be need, the counsel will contact the petitioner whereas that fact itself stands contradicted by the petitioner's own stand where the petitioner states that he was regularly contacting the local counsel. It is also submitted that there was no reason for condonation of delay

before the courts below and, therefore, the court below rightly held that the application is barred by time.

I have considered the submissions of learned counsel for the parties.

It is true that the earlier ex-parte decree was passed against the petitioner and that was set aside by the trial court. If there was a quarrel between the petitioner and his local counsel and the petitioner took away the file from the local counsel, then the same advocate would not have deposited the rent for the petitioner for such a long period of two years and that too till the month prior to the passing of the ex-parte decree dated 17.2.1997. The order-sheets reveal that the local counsel did not appear before the trial court on almost all the dates after the ex-parte decree was set aside by the trial court. Nothing has been explained by the local counsel why he continued to deposit the rent for the same premises for which his client took away file and has shown no faith in him. The facts only show that the petitioner was in touch and was continuously meeting with his advocate but the written statement was not filed. Their appears to be no reason to believe that the petitioner will continue to meet with counsel with whom he had a quarrel and he will have faith in advocate for depositing the rent for the same premises and will he not contest the suit.

Therefore, in the totality of the facts and

circumstances, these relevant facts should have been considered by the courts below and non-consideration of the same in correct perspective make the orders passed by the two courts below absolutely perverse as the findings recorded are based on improbabilities.

In view of the above discussion, this writ petition deserves to be allowed, hence allowed. The orders passed by the two courts below dated 6.2.2002 and 27.4.2005 are set aside, the application of the petitioner filed under Order 9 Rule 13 CPC is allowed and the judgment and decree dated 19.2.1997 is also quashed.

The petitioner shall pay the costs of Rs.5,000/- to the respondent no.1.

The trial court is requested to decide the suit expeditiously preferably within a period of one year. Both the parties are directed to appear before the trial court on 25.7.2005.

(PRAKASH TATIA), J.

S.Phophaliya